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REMARKS

“WE ARE ALL TEXTUALISTS NOW”: THE LEGACY OF JUSTICE ANTONIN SCALIA

REMARKS OF
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FRIDAY, SEPTEMBER 29, 2017
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One of my favorite extra-judicial activities is meeting with law students, and it is a pleasure to be with you today. But it is a special privilege to come back to the Jamaica campus of St. John's College from which I graduated 60 years ago, long before the Law School had moved here from Schermerhorn Street in Brooklyn, and when there was only one building on this former golf course.

I was honored to call Justice Scalia a role model and friend. What I hope to convey to you today, however, is the effect Justice Scalia's tenure on the United States Supreme Court had on the Court itself, other judges, and ultimately, the rule of law.

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I

Two years ago, during the Antonin Scalia Lecture series at Harvard, Justice Elena Kagan declared “we’re all textualists now.”¹ To the more recent members of the bar, Justice Kagan’s words may not seem terribly profound—of course any competent lawyer knows that when construing a statute one begins with the text. I can assure you, however, that this was not always the case. For those of us who remember a time before Scalia, Justice Kagan’s statement is a testament to the sea change the law has undergone in recent decades.

Indeed, in the same speech, Justice Kagan explained that if someone had mentioned “statutory interpretation” to her while she was in law school, she was not sure she “would even quite have known what that meant.” In those days, statutory interpretation “was not really taught as a discipline.”² Such were the Dark Ages.

For decades, law schools, the Supreme Court, and the legal profession as a whole had been hostile to conservative legal thought. This was true in 1963 when I graduated from law school during the heyday of the Warren Court, and it was still true when Justice Kagan graduated from law school in 1986—the very same year that Justice Scalia joined the high Court, and I joined the Ninth Circuit. In fact, my commission was signed by President Reagan on September 26, 1986—the very same day *Judge* Scalia became *Justice* Scalia.

At that time, as Justice Kagan explained, the approach was “what should this statute be,” rather than what do “the words on the paper say.”³ Our law schools made common law lawyers of future judges, who believed it was the role of the judiciary to make law, not merely to interpret it, as Justice Scalia famously observed in his book: *A Matter of Interpretation*.⁴ To quote

¹ Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015) [hereinafter *Scalia Lecture Series*] <https://www.youtube.com/watch?v=dpEtszFT0Tg>.

² *Id.*

³ *Id.*

⁴ See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1997).

Justice Kagan, the entire judicial endeavor was "policy-oriented" with judges and law students alike "pretending to be congressmen."⁵

Such was the legacy of the legal realists and their intellectual heirs, who argued that judges do not in fact decide cases in accord with the law—not because judges are willful or incompetent, but because the law itself is radically indeterminate. This thinking laid the groundwork for the rise of the so-called purposivist school. According to such thinkers, every law had a purpose aimed at addressing some societal need. It was the task of the judge to serve as the legislature's partner to ensure that such purposes were carried out. This mindset empowered judges to break free from the bonds of statutory text to ensure that a preferred public policy was achieved.

And so when it came to applying the law, judges were, for the most part, guided by policy—not text. These common law judges felt comfortable going beyond the text of the Constitution to resolve a large number of questions that were previously left to the other branches or to the states. Whether it was policing the equality of congressional districts or scrutinizing Congress' exercise of its Fourteenth Amendment enforcement authority, courts felt empowered to involve themselves in an expanding array of constitutionally significant disputes. The late Justice William Brennan used to hold up one hand, fingers spread, to illustrate what he called the most important rule in constitutional law: the Rule of Five. With five votes, a Justice can do anything. Needless to say, the original understanding of our founding document carried little weight.

Of course all this was precisely the approach to judging that Alexander Hamilton in Federalist 78 had warned against when he wrote that "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body."⁶

Yet, in 1986, to ask what the founding generation may have thought about a question of constitutional interpretation was to identify oneself as an outlier, even a pariah—a fringe legal thinker not competent to serve on the bench. Indeed, one need

⁵ *Scalia Lecture Series*, *supra* note 1.

⁶ THE FEDERALIST NO. 78, at 395 (Alexander Hamilton) (Yale Univ. Press ed. 2009).

only reflect upon the treatment of Robert Bork to understand what an originalist could come to expect if his views were known. For judges who believed that Hamilton had gotten it right, these were dark days.

II

Fortunately for all of us, however, Justice Scalia slipped miraculously through the confirmation process, though at least one commentator later argued that his record prior to joining the Supreme Court “was ‘worse’ than Bork.”⁷ With the elevation of Justice Scalia, judges who had once risked losing their credibility for embracing originalism now had an advocate on the high court. Justice Scalia gave us top cover—he paved the way for judges like me to embrace openly a traditional view of judging that advocated a limited role for the courts. Through his force of reason, biting wit, and powerful pen, Justice Scalia made textualism and originalism respected schools of thought.

But Justice Scalia’s presence on the Court did more than just provide encouragement—it changed minds. In the words of Justice Kagan, Justice Scalia “taught everybody how to do statutory interpretation differently.” Today, we are all textualists, she said, “in a way that was not remotely true when Justice Scalia joined the bench.”⁸

Indeed, the most powerful testament to the way Justice Scalia changed the conversation is how liberals and conservatives alike now employ the rhetoric of textualism and originalism. Such is emphasized in Justice Kagan’s comments at Harvard, where she explained

[W]hen judges confront a statutory text, they’re not the writers of that text; they shouldn’t be able to rewrite that text. There is a text that somebody . . . has put in front of them, and . . . what you do with that text is a very different enterprise than the enterprise that Congress . . . has undertaken in writing that text.⁹

And, this is coming from an Obama-appointed Supreme Court justice!

⁷ David A. Kaplan, Opinion, *Scalia Was ‘Worse’ than Bork*, N.Y. TIMES (Oct. 19, 1987), <http://www.nytimes.com/1987/10/19/opinion/scalia-was-worse-than-bork.html>.

⁸ *Scalia Lecture Series*, *supra* note 1.

⁹ *Id.*

More importantly, this focus on the *actual* text is exemplified in recent Supreme Court opinions. In *Yates v. United States*,¹⁰ the Court considered whether a section of the Sarbanes-Oxley Act that criminalizes evidence-tampering could be applied to a commercial fisherman who caught undersized red grouper in U.S.-controlled waters in the Gulf of Mexico.¹¹ After being issued a citation by a fisheries officer, the fisherman had the evidence—his catch—thrown back into the sea, rather than bringing it to port as ordered by the officer. A plurality opinion written by Justice Ginsburg relied on the statutory context to conclude that Section 1519 applied only to “objects one can use to record or preserve information,” such as disk drives, not all objects in the physical world. Such a reading confined the application of the statute to situations closer to what the plurality thought the Sarbanes-Oxley Act was designed to cover—“fraud in financial record-keeping.”¹² In this way, the plurality attempted to implement what it perceived as the will of Congress—the pre-Scalia method of interpretation.

Yet, Justice Kagan wrote a notable dissent, joined by Justices Scalia, Kennedy, and Thomas, in which she began with the “text” of the statute, which “prohibits tampering with ‘any record, document, or *tangible object*’ in an attempt to obstruct a federal investigation.”¹³ Famously citing Dr. Seuss’s *One Fish Two Fish Red Fish Blue Fish*, Justice Kagan argued that the “the ordinary meaning of ‘tangible object’ is ‘a discrete thing that possesses physical form,’” as even the plurality opinion written by Justice Ginsburg had acknowledged.¹⁴ Thus, according to Justice Kagan, “tangible object” plainly covered fish, notwithstanding the plurality’s attempts at discernment.

Justice Alito wrote a separate opinion concurring with the plurality. He applied the statutory canons of *noscitur a sociis* and *ejusdem generis* to argue that “tangible object” should be limited to something “similar to records or documents.”¹⁵

¹⁰ 135 S. Ct. 1074 (2015) (plurality opinion).

¹¹ 18 U.S.C. § 1519 (2012).

¹² *Yates*, 135 S. Ct. at 1087 (Ginsburg, J., plurality).

¹³ *Id.* at 1090 (Kagan, J., dissenting) (emphasis added) (quoting 18 U.S.C. § 1519 (2012)).

¹⁴ *Id.* at 1091 (quoting *id.* at 1081 (Ginsburg, J., plurality)).

¹⁵ *Id.* at 1089 (Alito, J., concurring).

As *Yates* illustrates, Justice Scalia's focus on the plain meaning of a text may not always win the day, but such approach can shake up the traditional divide between liberals and conservatives. Justice Ginsburg was forced to acknowledge the textualist arguments in Justice Kagan's dissent and responded by using statutory canons of interpretations to bolster her broader reliance on legislative context. Justice Alito likewise employed statutory canons—a textualist tool—in his concurrence. Textualism has changed the conversation.

Indeed, when divisive political issues are not at stake, the Supreme Court frequently adopts a textualist approach. A recent example is *Lockhart v. United States*,¹⁶ the very first opinion that the Court issued after Justice Scalia's death. At issue was a provision which adds a sentencing enhancement for prior convictions "under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward. . . ."¹⁷ The question was whether the phrase "involving a minor or ward" applied to all three preceding categories of convictions, or merely the last one, "abusive sexual conduct." The majority, with Justice Sotomayor writing, carefully parsed the text and determined that the canon of construction known as the rule of the last antecedent dictated that the phrase "involving a minor or word" modified only the last category of conviction in the list, "abusive sexual conduct."

Justice Kagan, joined by Justice Breyer, wrote a dissent arguing that the rule of the last antecedent was overcome by another rule of construction which held that a modifier at the end of the list generally applies to the entire series, if the series has "a straightforward, parallel construction."¹⁸ Thus, Kagan contended that "involving a minor or ward" should apply to all three categories of convictions. Both the majority and dissent cited opinions written by Justice Scalia to support their respective contentions, in addition to that New Bible of statutory interpretation, the 2012 book by Justice Scalia and Bryan Garner entitled *Reading Law: The Interpretation of Legal Texts*. In other

¹⁶ 136 S. Ct. 958 (2016).

¹⁷ 18 U.S.C. § 2252(b)(2) (2012).

¹⁸ *Lockhart*, 136 S. Ct. at 970 (Kagan, J., dissenting) (quoting ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 147 (2012)).

words, in *Lockhart* Justices Sotomayor and Kagan literally were quoting Scalia back and forth at each other. This is a stark change from 1986.

Justice Scalia reoriented the Court not only toward textualism, but also its close cousin, originalism, which is merely textualism applied to constitutional interpretation. Justice Scalia’s contributions to originalism cannot be underestimated. More than anyone else, he made originalism a respected means of analysis. With his emphasis on original public meaning, rather than what went on in the heads of the Founders, Justice Scalia answered many of the critiques that had been made of the earlier form of originalism, original intent. His repeated application of originalist analysis forced other justices to respond and even to reevaluate their own positions.

Although other justices may employ originalism less frequently than textualism—constitutional questions are more likely than statutory questions to have significant political implications—still, the more liberal members of the Court have begun couching some of their arguments in originalist terms.

Perhaps the most famous example of this is *District of Columbia v. Heller*.¹⁹ In that case Justice Scalia wrote a majority opinion that conducted an extensive review of history and tradition to conclude that the Second Amendment protects an individual right to bear arms. Justice Scalia’s opinion is a model of the originalist method. Yet perhaps the most surprising thing about *Heller* was that Justice Stevens’s dissent *also* employed history and text to reach the *opposite* conclusion—the Second Amendment only protected the right of militia members to bear arms. Indeed, Justice Stevens conducted a point-by-point refutation of Justice Scalia’s reliance on the English Bill of Rights, *Blackstone’s Commentaries*, and similar sources. There was a similar, though less extensive, discussion about history on the part of the liberal justices who dissented in the follow-on case of *McDonald v. City of Chicago*.²⁰ Regardless of whether you agree with the dissenters’ analyses in these cases, fights over history and text are very different from fights about naked policy preferences.

¹⁹ 554 U.S. 570, 575 (2008).

²⁰ 561 U.S. 742 (2010). *See, e.g., id.* at 931–38 (Breyer, J., dissenting).

A more recent example is the Court's 2016 decision in *Evenwel v. Abbott*,²¹ which also was issued after Justice Scalia's death. The question was whether states could draw legislative districts on the basis of total population rather than the basis of eligible-voter population under the Equal Protection clause. Justice Ginsburg wrote the opinion of the Court,²² concluding that it was permissible for states to draw districts on the basis of total population. She began with "constitutional history," discussing the Founders and quoting the Federalist Papers, and then proceeded to outline the background of the Fourteenth Amendment, before turning to past Supreme Court precedent and settled practice.²³ Regardless of whether one agrees wholly with her analysis, Justice Ginsburg's decision to start with constitutional history is a marked departure from many of the Court's past precedents. For example, Justice Ginsburg's opinion in *United States v. Virginia*,²⁴ the all-male Virginia Military Academy case also involving the Equal Protection clause, *never* considered an original understanding of the Fourteenth Amendment.

Some might contend that in cases like *Heller* and *Evenwel*, liberal justices were employing history merely to attempt to win over the Court's more conservative wing, not because they were actually persuaded by originalist arguments. Even if this were true, these opinions still represent a significant change. It is far better to be debating text and history than to be discussing the latest social science research in the manner of Brandeis Briefs. The Court's attention to text and history forces the rest of the legal world—lower court judges, academics, and law students—to evaluate these types of arguments. It demonstrates that these arguments are respected and provides further justification for judges like myself to use them in persuading our own colleagues.

Witnessing such developments from a level below, judges like myself who share Justice Scalia's judicial philosophy have gained confidence that our approach to the law—the limited approach advocated by Hamilton—is no longer viewed with disdain. Indeed, sometimes we even have been vindicated.

²¹ 136 S. Ct. 1120 (2016).

²² Note that Justice Thomas and Justice Alito wrote concurring opinions.

²³ *Evenwel*, 136 S. Ct. at 1127–32.

²⁴ 518 U.S. 515 (1996).

Washington v. Glucksberg,²⁵ for example, was a case in which a majority of the United States Court of Appeals for the Ninth Circuit sitting in limited en banc invoked the doctrine of substantive due process to strike down as unconstitutional a state ban on physician-assisted suicide as applied to terminally ill adults. I dissented to the denial of a full-court en banc rehearing as I believed that the Due Process Clause could not possibly be construed so as to guarantee a right to suicide.²⁶ Borrowing the words of Justice Frankfurter, I reminded the court that "[o]ur duty to abstain from confounding policy with constitutionality demands perceptive humility as well as self-restraint in not declaring unconstitutional what in a judge's private judgment is deemed unwise and even dangerous."²⁷ The Supreme Court reversed the limited en banc court unanimously.²⁸

III

Nonetheless, just last year, many worried that if conservatives lost a majority on the Court because of the death of Justice Scalia, reversals like *Glucksberg* would no longer occur. Their fear was that without Justice Scalia, other justices would be less likely to continue employing textualist and originalist approaches. But with Justice Gorsuch now in Scalia's seat, their worries have subsided, at least for the time being. In any event, while counting to five is always a concern, I am not persuaded that other justices began using text and history only for sophist ends, applying the method while ignoring the force of Justice Scalia's reasoning.

It has been said that people reveal their true character in the actions taken when no one is looking.²⁹ I find it especially telling that the Court is most likely to apply textualism when there are fewer people watching—when the political stakes are low. I submit that the Court routinely follows the text in low-stake situations because textualism is the essence of judicial review.

²⁵ 521 U.S. 702 (1997).

²⁶ *Compassion in Dying v. Washington*, 85 F.3d 1440 (9th Cir. 1996) (O'Scannlain, J., dissenting), *rev'd sub nom.* *Washington v. Glucksberg*, 521 U.S. 702 (1997).

²⁷ *Id.* at 1446.

²⁸ *Glucksberg*, 521 U.S. at 709.

²⁹ "The true test of a man's character is what he does when no one is watching," attributed to John Wooden, the legendary basketball coach.

Judges are given texts, whether in the form of statutes or the Constitution, and asked to apply them to concrete situations. In the words of Blackstone, a judge is “not delegated to pronounce a new law, but to maintain and expound the old one.”³⁰ As Justice Scalia repeatedly proclaimed, our job is not to make the law; it is to apply the law as already written.

Textualism is straightforward. It takes significant mental gymnastics to conjure away the meaning of a clear text, or to find a heretofore unknown right in the penumbras and emanations of the Constitution. Textualism is not always easy, but the method is plain: Take a text, look to the common definitions of the words at the time the text was enacted, and apply canons of construction. In some cases, this can be hard work and involve significant research. It is not glamorous, but it is the standard stuff of lawyering.

Textualism is not only straightforward, it is also fair. After Justice Scalia joined the high court, various commentators noted, with surprise, that he did not always side with the so-called conservative wing of the bench. Indeed, some of the most fascinating lineups occurred when Justice Scalia joined the more liberal side of the Court, which was not uncommon in the First and Fourth Amendment contexts.

For example, in *Maryland v. King*,³¹ Scalia wrote a dissent joined by Justices Ginsburg, Sotomayor, and Kagan concluding that the Fourth Amendment barred the suspicionless collection of DNA. In *Brown v. Entertainment Merchants Ass'n*,³² Justice Scalia wrote the majority opinion of the Court, joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan, striking down a California law that banned the sale of violent video games to minors. And, in *Texas v. Johnson*,³³ Justice Scalia provided the crucial fifth vote holding that states could not prohibit flag burning. Now, one might disagree with Justice Scalia's application of originalism in these cases, as Justice Thomas and others have, but the crucial point is that textualism does not necessarily cut in a liberal or conservative direction. Indeed, Justice Scalia would have been the first to tell you—and in fact, stated publicly on multiple occasions—that the end result of his

³⁰ 1 WILLIAM BLACKSTONE, COMMENTARIES *69.

³¹ *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013) (Scalia, J., dissenting).

³² 564 U.S. 786 (2011).

³³ 491 U.S. 397 (1989).

application of textualism and originalism did not always align with his own policy preferences. Instead, textualism follows "We the people."

Whether one is liberal or conservative, it may be tempting to heed the siren call to apply one's own conceptions of what the law should be. Yet, as Justice Scalia emphasized, to do so would substitute our will for the will of the people acting through their elected representatives. It would take "We the People" and replace it with "We the judges." While some judges might be surprised to learn this, we are not enlightened philosopher-kings, and we are certainly not congressmen, as Justice Scalia admonished us on more than one occasion.³⁴

IV

In sum, Justice Scalia not only made textualism and originalism respected—even mainstream—as the opinions of his colleagues in cases like *Yates*, *Lockhart*, *Heller*, and *Evenwel* demonstrate, but he reminded us anew of the fundamental role of judges—to uphold the rule of law, not to enact our personal policy preferences. Such will be his greatest legacy.

And, as Justice Kagan observed, "the truth of the matter is [that if] you wake up in 100 years . . . most people are not going to know most of our names," but that is "not the case with Justice Scalia."³⁵

Indeed, we are all textualists now.

Thank you.

³⁴ See, e.g., *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) ("We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.").

³⁵ *Scalia Lecture Series*, *supra* note 1.